

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 298 OF 1990.

WITH

SUO MOTU PETITION NO.3 OF 1990
(for enhancement of sentence,)

Dilip Dattatraya Shinde,
aged 33 years, Occ.: Agriculture,
residing at Patkhal, Taluka
and District: Satara.

... Appellant.
(Org. Accused)

Versus.

The State of Maharashtra

... Respondent.

Shri V.S. Kotwal with Shri Manoj S. Mohite for the
Appellant.

Shri D.P. Adsule, A.P.P. for the Respondent.

CORAM : ABHAY S. OKA, J.

DATE ON WHICH
JUDGMENT IS RESERVED : 13TH November, 2006.

DATE ON WHICH
JUDGMENT IS PRONOUNCED: 23rd November, 2006.

JUDGMENT. :

1. The Appellant by preferring this Appeal has taken exception to the Judgment and Order dated 3rd May 1990 passed by the learned Additional Sessions Judge, Satara by which he has been convicted for the offence punishable under section 376 of the Indian Penal Code. He is sentenced to suffer R.I. for four years and to pay fine of Rs.500/-. In default of payment of fine, the Appellant was directed to suffer R.I. for three more months. The Appellant was also convicted of the

offence punishable under section 506 of the Indian Penal Code. However, separate sentence is not imposed for the said offence.

2. Briefly stated the case of the prosecution is that the Complainant Hirabai (P.W.7) was 27 years old at the time of commission of alleged offence. She was married. However, for a period of about 7 to 8 years she was residing in her father's house as she was deserted by her husband. The allegation of the prosecution is that about a year prior to the date of the incident, the Appellant was teasing Hirabai i.e. the prosecutrix. At that time the prosecutrix has filed a complaint with the Police Station against the Appellant. Accordingly a chapter case was initiated by the Police against the Appellant.

3. The incident in question took place on 31st March 1989. The Prosecutrix was residing with her father Yamaji (P.W.8) and her mother. Her two brothers were residing elsewhere for earning livelihood. On the date of the incident, the mother of the prosecutrix had gone to visit her brothers. At about 7.00 a.m. Yemaji (P.W.8) left his house for doing labour work in the field on one Pralhad Shinde. After departure of her father, the prosecutrix cooked necessary food. She had collected firewood and it was kept in the field of one

Baban Shinde. At about 2.00 p.m. the said Baban Shinde came to the house of Yemaji and he called upon the prosecutrix to bring the fire wood to his house. Accordingly the prosecutrix went to the field of Baban Shinde and loaded the firewood on the bullock cart. Baban Shinde left the field by the said bullock cart. The prosecutrix had carried her goat to the field of Baban Shinde and she had tied the goat to a tree. She was standing near a bunch of firewood which was remaining after loading the firewood in the bullock cart of Baban Shinde.

4. At that time the Appellant appeared on the spot. After his arrival he made his intention clear that he was desirous of taking revenge against the prosecutrix, Thereafter he committed offence under section 376 of the Indian Penal Code. While leaving the field, he threatened the prosecutrix not to disclose the incident to any one or else she will have to face the consequences. The prosecutrix went back to her father's house. Since father was not in the house, she went to the field where he was working and disclosed to him the incident. After hearing about the incident, Yamaji collapsed. At about 5.30 p.m. in the evening the prosecutrix took a State Transport Bus and reached Satara Taluka Police Station at about 6.00 p.m. Thereafter F.I.R. was reduced into writing at 8.00 p.m.

Immediately thereafter the prosecutrix was referred to a Medical Officer who examined her at about 9.00 p.m. At about 9.30 p.m. the Appellant was arrested. The clothes on his person were seized under the panchanama. The prosecutrix spent the night in the Police Station. On the next day morning, the prosecutrix proceeded to her village. She showed the spot of incident and a panchanama was drawn. Certain bangle pieces were found at the spot. Thereafter the prosecutrix went back to the Police Station and handed over the clothes on her person which were seized under a panchanama. On 3rd April 1989, the complainant produced her torn blouse and mangalsutra before the Investigating Officer.

5. Shri Kotwal appearing for the Appellant submitted that this was a fit case where the testimony of the prosecutrix ought to have been discarded as it is totally untrustworthy. He submitted that there was unexplained delay in lodging the F.I.R. He stated that the clothes on the person of the prosecutrix were seized in the evening on 1st April 1989. He pointed out the prosecutrix spent entire night of 31st March 1989 in the Police Station and there was no explanation whatsoever for the delay in seizure of the clothes on the person of the prosecutrix. He submitted that in view of the said delay, report of the Chemical Analyser as regards the stains on the clothes of the prosecutrix deserves to be

discarded. He stated that there was a serious discrepancy as regards the spot of incident. He submitted that it was clear that the prosecutrix was not sure whether the offence was committed in the field of Baban Shinde (P.W.1) or the adjoining field of one Uttam Shinde. He submitted that the panch witnesses to the panchanama of the spot have turned hostile and therefore, the prosecution could not prove the spot where the offence was committed. He submitted that on a plain reading of the evidence of the prosecutrix, her version appears to be doubtful. He pointed out that according to the prosecutrix after the accused came to the spot of incident, he untied the goat of the prosecutrix and started taking it along with him. The prosecutrix further disclosed that she raised objection and that is where the dispute started between them. He submitted that the material improvements were made by the prosecutrix in her evidence. He pointed out that in her cross-examination, the prosecutrix admitted that when the Appellant was doing the act he was holding both her hands. He stated that according to the prosecutrix when the offence was committed at a place in the field where initially crop was taken and it was cut. He submitted that there was absolutely no explanation for the absence of the injury on the back of the prosecutrix. He therefore submitted that the testimony of the prosecutrix deserves to be rejected and the

conviction cannot be based on the sole testimony of the said prosecutrix. He submitted that though in law there can be a conviction only on the basis of the sole testimony of the prosecutrix, if her testimony was found be untrustworthy, the case must result in an acquittal.

6. The learned A.P.P. has taken me through the evidence of various witnesses and submitted that no interference was called for in view of the findings recorded by the learned trial Judge which are based on the evidence on record. The learned A.P.P. submitted that the judgment of the trial Court is a well considered judgment and therefore, no interference was called for.

7. I have carefully considered the submissions. It will be necessary to refer to the evidence of the prosecution witnesses. P.W.1 Baban Narayanrao Shinde was allegedly a panch witness to the scene of offence panchanama. The said witness was declared hostile. P.W.2 Bhausaheb Deshrath Gaikwad was also a panch witness to the scene of offence panchanama. He was also declared hostile. The third prosecution witness Laxman Shete was a panch witness to the panchanama of seizure of clothes. He also turned hostile. P.W.4 Vasant Vithal Deorukhe stated in his evidence that on 31st march 1989 when he had gone to the Police Station there

was one person present at the Police Station. He produced the clothes on his person before the Police. He produced payjama, underpant and shirt. He identified the said articles. He, however, stated that he cannot definitely say if the accused before the Court was the person present before the Police. He proved the seizure panchanama in his evidence. P.W.5 Hussain Mahomed Pathan is again a panch witness. He stated that the prosecutrix produced the clothes which she was wearing at the time of alleged offence in presence of the said witness. He stated that there were certain stains on the said clothes. In cross-examination he admitted that when he reached the Police Station, panchanama was already written. P.W.6 Nathuram Hari Nalavade was declared hostile. He has acted as a panch witness before whom on 3rd April 1989 the prosecutrix produced a blouse and managalsutra.

8. P.W.7 Hirabai Vishnu Jarag (the prosecutrix) deposed that her marriage was performed in the year 1973 and she was having a daughter. She stated that her husband had performed a second marriage and since last 8 years she was residing with her parents. She stated that she was earning her livelihood by working as a labourer. She deposed that an incident had taken place one year prior to the date of offence. She stated that the Appellant was picking up quarrel with her and was

teasing her and therefore, she had filed a complaint against the Appellant. She has stated that Chapter proceedings were initiated against the Appellant by the Police and that he was arrested and later on released. She thereafter stated that on the date of the incident her father left for work in the field. She stated that in the afternoon one Baban Shinde came to her house and called her to his field for collecting the firewood. Thereafter she stated that she went to the field. She also carried her goat with her and had tied it to a tree in the field of Baban Shinde. She stated that substantial part of the firewood which was already collected was stacked in a bullock cart and the said Baban Shinde left the field of by his bullock cart and thereafter she was alone in the field along with her she goat. In paragraph 3 of her evidence, she proceeded to state as under:

"At about 2.30 p.m. the accused came to that spot. The accused owns a field which is some distance away from the field of Baban. There are 2/3 fields in between the place of incident and the field of the accused. The accused untied the she-goat and started taking it along with him. I objected to the accused that he should not carry my she-goat. The accused told me that he had come to that spot

for taking revenge as I had filed a complaint against him. Despite of this, he started carrying the she-goat. On seeing my resistance the accused left that she-goat and came towards me. The accused forcibly dragged me towards the field of sugarcane. By then that crop was already harvested. The accused dragged me from the field of Baban Shinde towards the place of the incident. The accused dragged me about 25/30 feet. The accused used force against me. I was forced to lie on the ground. The accused pulled my saree. In that process the saree was torn. The accused forcibly broke open my blouse by breaking the buttons. The accused undressed himself. He lifted my saree and petticoat upto my wrist. He committed forcibly sexual intercourse by inserting his penis into my vagina. I tried to resist by pushing the accused as the accused has committed sexual intercourse against my consent, my bangles were broken. My mangalsutra was also broken. As the accused was committing sexual intercourse and as I was resisting him, semen stains fell on my saree and petticoat. The accused got up. He threatened me that I should not lodge complaint or else, I will

have to face the dire consequences. The accused took the she-goat and carried it to his house."

9. The prosecutrix thereafter stated that she went back to her father's house. As there was no one in the father's house, she proceeded to the field where her father was working. She met her father by about 4.45 p.m. After hearing the news, her father collapsed and he was not in a position to accompany her to the Police Station. By about 5.30 p.m., she boarded a State Transport Bus and reached Satara city. She visited Satara Taluka Police Station and lodged the FIR. She stated that early in the morning at 2.30 a.m. on 1st April 1989, she was examined by a Medical Officer. She spent the remaining night in the Police Station and on the next day she returned to the village. At about 12.00 noon the Police came to the village. She showed the spot of incident, where bangle pieces were found which were seized under a panchanama. She stated that bangles which were on her person tallied with the said bangle pieces. She stated that her bangles and the bangle pieces were seized. She identified the said articles in the Court. She stated that by 3.00 p.m. on 1st April 1989 she was again taken to the Police Station where on the request made by the Police, she produced the saree and petticoat which was on her person at the

time of incident. She identified the said clothes in the Court. She stated that two days thereafter she produced her blouse which was on her person at the time of the incident and mangalsutra. She identified the said articles in the Court.

10. In cross-examination she admitted that she had informed the Police that the incident had taken place in the field of Baban Ramchandra Shinde. She stated that the field of Uttam Shinde is on the other side of the field of Baban Shinde. She stated that there is a bandh (bund) of about 6 to 7 feet between the fields of Uttam Shinde and Baban Shinde and there are two babul trees on the said Bandh. She stated that when the Appellant untied her she-goat, she did not raise any hue and cry. She denied the suggestion that four to five ladies were working in the adjoining land of one Mukinda Patil. She stated that when the Appellant started walking away with the goat she obstructed him. At that time she was standing near the firewood. Thereafter the accused started coming towards her. When she ran about two to three steps towards the bandh, the Appellant caught hold of her wrists. The Appellant dragged her upto bandh where he forced her to lie down on the ground. She stated that he dragged her upto the field of Uttam Shinde. She stated that the crop on the side of the bandh was eaten by the cattle and therefore it was a

plain surface. She stated that she had informed the Investigating Officer that she was dragged from the field of Baban to the field of Uttam. However, the said fact was not mentioned in the F.I.R. She admitted that when she was being dragged from the field of Baban to the place of incident, she was shouting and she told him not to behave in that manner. She stated that the Appellant fell her on her back after dragging her to the spot. She stated that she might have given two or three kick blows and must have pushed the Appellant. She stated that the Appellant had removed the blouse by means of jerk and thereby four buttons of the blouse were broken. She stated that she was unable to tell whether the clothes on the person of the Appellant were having semen stains. In the cross-examination she admitted that till afternoon on 1st April 1989, she was wearing the same clothes which she was wearing at the time of incident. She denied the suggestion that she had gone to the Police station with one Pandurang Shinde. She admitted that the Appellant was married. She denied that the Appellant had not committed the offence.

11. P.W.8 Yemaji Dhondiba Barkhade stated that at about 4.30 p.m. on the date of incident, the prosecutrix came to the place of his work. Her saree was torn. She informed him about the offence committed

by the Accused. As a result he became unconscious. He stated his wife had gone to his son's place. In the cross-examination he denied that the prosecutrix was working in the house of Pandurang Shinde who was not on good terms with the Appellant. He denied the suggestion that when one year prior to the incident, the prosecutrix had lodged complaint against the Appellant, the Appellant had met him and informed him that the prosecutrix had abused him.

12. P.W.9 Balvant Bhikaji Patil is the Medical Officer who examined the prosecutrix at about 9.00 p.m. on the same day. He issued the certificate at 1.45 a.m. on 1st April 1989. In his deposition he has stated thus:

"I had examined her at about 9.00 p.m. There was no external injury on her person. Secondary sex characters were developed. There was no injury over vulva, vagina and perineium. The hymen was already ruptured. Vagina admits two fingers. Vagina was healthy. No tenderness over forhices. I had taken her blood, vaginal swab and pubic heirs. Accordingly, I have issued a certificate. The medical certificate now shown to me is in my handwriting. It bears

my signature. The contents are correct. It is produced at Exh.22. Although I had examined her at about 9.00 p.m. I had issued the certificate on 1.45 a.m. on 1.4.89. There may or may not be injury on the private part of a grown up lady who is habituated to sexual intercourse in case of rape."

The certificate issued by him at Exh.22 discloses that hymen was ruptured and she was habituated to intercourse.

13. P.W.10 Tanaji Dhondi Potekar was working as PSI at the relevant time with Satara Taluka Police Station. He registered the offence against the Appellant. He described details about the arrest of the Appellant and preparation of the spot panchanama on the next day. He also deposed about the seizure of bangle pieces found on the site as well as the seizure of the clothes on the person of the prosecutrix.

14. P.W.11 is one Arun Shripatrao Barge who took over investigation from Head Constable Potekar on 1st April 1989. He narrated about the recording of statement of certain witnesses and sending of samples of blood of the accused and seized articles to the Chemical

Analysed. He stated that he forwarded the samples of blood of the prosecutrix to the Chemical Analyser. He referred to the report of the Chemical Analyser.

15. The report of the Chemical Analyser is at Exh.29 shows that the blood group of the blood of the Appellant could not be determined. The report discloses that on the pyjama of the Appellant no semen was detected. In another report of the Chemical Analyser at Exh.30, it was stated that on the saree (in torn condition) on the person of the prosecutrix, few semen stains ranging from 0.5 to 5 cms diameter spread at one end and middle portion were found. The report also discloses that on the petticoat on the person of the prosecutrix there were certain stains of semen ranging from 0.5 to 5 cms diameter spread at places. It is stated that semen stains and blood stains are of human being. However, the blood group could not be determined. On the pyjama of the Appellant certain blood stains were found.

16. Shri Kotwal has emphasised on the fact that though the prosecutrix was dragged to a distance of about 25 to 30 feet, significantly there were no external injuries on her body. If the evidence of the prosecutrix is carefully scrutinised, it is seen that she has stated that at the spot of the incident she fell down and she was made to lie down. She has simply

stated that that the Accused dragged her towards the field of sugarcane. She has stated that after she was dragged to the field where offence was committed, she was forced to lie down. In the cross-examination the prosecutrix has again stated that the Appellant forcibly made her fall on the ground after she was dragged upto the spot. Thus the prosecutrix was not on her back when she was dragged for a distance of about 25 to 30 feet. This clearly explains the absence of injuries on the back and other parts of the body of the prosecutrix.

17. A submission was made that the spot panchanama is not proved as the panch witnesses turned hostile and the version of the prosecutrix about the spot of incident is inconsistent. A perusal of the examination-in-chief of the prosecutrix shows that she has never stated that she was taken to the adjoining field. She has stated that the accused dragged her towards the field of sugarcane and at that place crop was already harvested. Only because the prosecutrix has further stated that the Appellant dragged her from the field of Baban Shinde towards the place of incident, it cannot be gathered that the incident took place in the adjoining field. In the cross-examination she has stated that there was a bund of six to seven feet in between the field of Baban Shinde and the adjoining field of Uttam Shinde. In the cross-examination she has

stated that the Appellant dragged her upto the field of Uttam Shinde. In cross-examination she has stated that while her F.I.R. was being recorded, she stated to the Police that she was taken to the field of Uttam Shinde. These minor contradictions in evidence about the place where offence has taken place does not affect the core of the prosecution case.

18. It must be noted here that after informing her father about the incident, the prosecutrix immediately proceeded to Satara Taluka Police Station and lodged the F.I.R. on the same day. After the incident the prosecutrix came back to her father's house. When she found that the father was not there, she immediately proceeded to the field where her father was working. She narrated the incident to the father and immediately thereafter boarded a State Transport bus and reached Satara Taluka Police Station. The Appellant was arrested on the same day at about 9.30 p.m. in the night. As pointed out earlier, the Chemical Analyser has found blood stains on the pyjama of the Appellant. It is true that there is a delay in seizing the clothes on the person of the Prosecutrix. However, it has come on evidence that at 1.45 a.m. on 1st April 1989, her medical examination was completed and certificate was issued by the Medical Officer. Thereafter she had to spend a night at the Police station and in the morning

she went back to her village and immediately thereafter she took the Police to the spot of incident. After panchanama was recorded, she was taken back to the Police Station when she handed over the clothes on her person. On her clothes viz. the torn saree and petticoat semen stains were detected. After the incident she had immediately proceeded to the Police Station and she had no opportunity to change her clothes. Looking to the sequence of events as narrated by the prosecutrix and the Investigating Officer, it is difficult to come to the conclusion that the clothes on the person of the prosecutrix which were seized were not worn by her at the time of incident.

19. In the case of State of Punjab v/s. Gurmit Singh [(1986) 2 SCC page 384), the Apex Court has held that there is no necessity of looking for corroboration of the statement of the prosecutrix and acting on the testimony of the prosecutrix the Court can convict an accused person where her testimony inspires confidence and is found to be reliable. The prosecutrix Hirabai has lodged the F.I.R. at the earliest. She has described the incident in a very coherent manner and without making any attempt of exaggeration. The report of the Chemical Analyser as regards the semen stains on her clothes supports the case of the prosecutrix. No attempt has been made by the defence to explain how

there could be semen stains on the saree and petticoat. The learned trial Judge has rightly accepted the testimony of the prosecutrix as it does inspire confidence. As stated earlier, assurance can be drawn to her statement from the report of the Chemical Analyser and other evidence on record.

20. The Apex Court in the aforesaid decision held that the Court must while evaluating the evidence remain alive to the fact that in a case of rape, no self respecting woman would come forward in Court just to make a humiliating statement against her honour. The Apex Court held that even discrepancies in the evidence of the prosecutrix should not, unless the discrepancies are of fatal nature, be allowed throw out an otherwise reliable prosecution case.

21. Shri Kotwal is right when he submits that if evidence of the prosecutrix is not trustworthy, the conviction cannot be based on such an evidence. However, in the present case applying the test laid down by the Apex Court, the version of the prosecutrix does inspire confidence. Therefore, I find no error in the order of conviction passed by the trial Court.

22. While admitting the Criminal Appeal, this Court issued suo-moto notice for enhancement of sentence. The notice has been duly served to the Appellant. In the present case the sentence awarded is R.I. for four years and a fine of Rs.500/-. The incident is of 31st March 1989. Throughout the trial the Appellant was on bail. While admitting the Appeal bail was refused. However, on 11th September 1990, this Court granted bail in favour of the Appellant. The Appeal is coming up for hearing after 16 years. Considering the facts and circumstances of the case, I find that the discretion exercised by the trial Court by imposing sentence of R.I. for four years is just and proper. Considering the peculiar facts of the case, it will not be proper at this stage to enhance the sentence.

23. Hence the following order is passed:

- i) Criminal Appeal No.298 of 1990 is dismissed. The Appellant is directed to surrender to bail. He shall be taken in custody to undergo sentence.
- ii) Suo-moto notice for enhancement being petition No.3 of 1990 stands discharged.

Judge .